A **CALEY OTOTO WORLDWIDE SDN BHD**

v.

SUN WEN LONG

B HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S3-22-496-2001]
3 JULY 2009

C ***COMPANY LAW:*** *Directors - Fiduciary duties - Breach - Allegation of - Receiving monies under various contracts and depriving plaintiff of the benefit of various orders for supply of goods - Whether allegations against defendant collapsed for failure of calling material witness to testify - Whether plaintiff's claims based on mere conjectures*

D ***EVIDENCE:*** *Witness - Failure to call material witness to testify - Claim against director for breach of fiduciary duties - Hearsay - Whether admissible - Evidence Act 1950, s. 114(g) - Whether invoked - Whether allegations against defendant collapsed for failure of calling material witness to testify - Whether plaintiff's claims based on mere conjectures*

E

The plaintiff, a private limited company, claimed that the defendant, while holding the position of a managing director of the plaintiff, had personally received monies from PT International Corporation ('PTIC'), a Singapore company, under various F contracts for the supply of goods which were meant for the plaintiff amounting to RM802,521.24. The plaintiff also advanced another claim that the defendant had, after the defendant resigned as a managing director of the plaintiff, deprived the plaintiff of the benefit of various orders for the supply of goods to PTIC and G that the defendant had personally received the sum of RM1,489,313.67. The defendant, a Taiwanese national and a shareholder of the plaintiff, denied the plaintiff's claim and placed the plaintiff to strict proof thereto. The defendant disputed that PTIC had allegedly ordered certain goods from the defendant as H the managing director of the plaintiff and intending to contract with the plaintiff. The defendant also disputed that the goods were delivered by the defendant personally and that the monies transmitted by PTIC to the defendant's wife's bank account were allegedly meant as payment for the purchase of such goods I delivered by the defendant. The plaintiff disputed the defendant's explanation that the monies paid by PTIC to the defendant's

wife's bank account were part of the purchase price for goods sold to PTIC by one Liu Jin Shu and were meant for the benefit of the said Liu Jin Shu. The plaintiff had called only one witness to prove its claim, one Mr Ong Aik Lay (PW1) who gave a witness statement marked as Bundle 'G' and he relied entirely on it. In PW1's witness statement, he said that he had been informed by one 'Mr Pishu' of PTIC that PTIC had placed orders with the defendant intending to order them from the plaintiff and that the defendant had delivered the goods to PTIC. Under cross examination, PW1 admitted that he had no personal knowledge of what had transpired and that he only knew what this 'Mr Pishu' of PTIC had allegedly informed him. However, no explanation was advanced by PW1 as to why 'Mr Pishu' or for that matter any other officer of PTIC with personal knowledge of the alleged matters were not called as the plaintiff's witness. The whole of PW1's evidence hinged on 'Mr Pishu'. The issue that arose was whether the plaintiff was able to prove its alleged claim against the defendant.

Held (dismissing plaintiff's claim with costs):

(1) Hearsay is used to describe statements that one hears but does not know it to be true. The purpose of PW1 in referring to what 'Mr Pishu' had told him was to establish the truth of what 'Mr Pishu' had said orally to him, and this would be hearsay and inadmissible. Mr Pishu's testimony would make or break the plaintiff's case. Yet, Mr Pishu was not called as a witness for the plaintiff by the plaintiff. No explanation at all was given as to why Mr Pishu was not called. Had Mr Pishu been called, he would certainly shed some light to the whole case. He too would be cross examined by the defendant in regard to the alleged orders by PTIC and the alleged deliveries thereto including the necessity of producing copies of the shipping documents. Section 114(g) of the Evidence Act 1950 allowed the court to presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. The court was entitled to have the best evidence before it. The defendant was justified in imploring this court to invoke s. 114(g) of the Evidence Act 1950 in the absence of Mr Pishu bearing in mind that the burden to prove the case rested all along with the plaintiff. (paras 14, 20, 26, 28 & 29)

(2) The allegations against the defendant about contracting with PTIC without the plaintiff's knowledge, consent or authorization and retaining the proceeds of those contracts to himself together with the arguments that the defendant held the proceeds of those contracts by way of an implied trust for the benefit of the plaintiff and further that the defendant had made secret profits arising from those contracts and must be held accountable to the plaintiff collapsed to the ground like a deck of cards because Mr Pishu did not come forward to testify and the evidence of PW1 was hearsay and inadmissible. (para 48)

(3) The plaintiff's statement of claim pleaded and alleged that the defendant had received monies from PTIC. The plaintiff's statement of claim did not plead by way of an alternative that the monies had been received by the defendant's nominee or the defendant's wife. From the available evidence adduced before this court there was nothing to show that the defendant received any monies. The evidence showed that the monies paid by PTIC were received by the defendant's wife. That being the case, the plaintiff had failed to prove its case based on the pleadings. (para 57)

(4) A director owes a fiduciary duty to his principal and he must prefer his principal's interest to that of his own. If the director secretly makes a profit behind the back of his principal he must be accountable for it and he may be liable in damages for deceit. But in the present case at hand, the plaintiff was only conjecturing that the defendant had secretly made a profit for himself. The plaintiff's submissions were based on mere conjectures. The 'must be' and 'must have' basis could be dismissed in one single word as 'hearsay'. (para 66)

Case(s) referred to:

Adams v. R [1995] 2 BCLC 17 ***(refd)***

Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***

Australian Growth Resources Corporation Pty Ltd v. Van Reesema [1988] 13 ACLR 261 ***(refd)***

Bangkok Bank Ltd v. Prosperity Shipping & Trading (Pte) Ltd & Ors [1990] 1 MLJ xxix ***(refd)***

Billy Max Sparks v. The Queen [1964] AC 964 ***(refd)***

Bruce v. Odhams Press, Limited [1936] 1 KB 697 ***(refd)***

Chan Yoke Lain v. Pacific & Orient Insurance Co Sdn Bhd [1999] 1 CLJ 179 CA ***(refd)***

Chang Lee Swee v. PP [1984] 1 LNS 134 HC ***(refd)***

Ferguson v. Wilson [1866-67] 2 LR Ch App 77 ***(refd)***
Great Eastern Railway Company v. Turner [1872-73] 8 LR Ch App 149 ***(refd)***
Hospital Products Limited v. United States Surgical Corporation And Others [1984-1985] 156 CLR 41 ***(refd)***
In re Forest of Dean Coal Mining Company [1878-79] 10 Ch D 450 ***(refd)***
In re Lands Allotment Company [1894] 1 Ch 616 ***(refd)***
Intraco Ltd v. Multi-Pak Singapore Pte Ltd [1995] 1 SLR 313 ***(refd)***
KBB Properties Sdn Bhd v. Yong Chon Chiang [2006] 6 CLJ 421 HC ***(refd)***
Kelly v. CA & L Bell Commodities Corporation Pty Ltd [1989] 18 NSWLR 248 ***(refd)***
Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors [1998] 1 LNS 340 HC ***(refd)***
Mawaz Khan and Amanat Khan v. The Queen [1967] AC 454 ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 ***(refd)***
Nanyang Union Sdn Bhd v. Gloveline Industries (M) Sdn Bhd [2006] 1 CLJ 873 CA ***(refd)***
Phillips v. Phillips And Others [1878-79] 4 QBD 127 ***(refd)***
PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55 FC ***(refd)***
R v. Willis [1960] 1 All ER 331 ***(refd)***
Ramoo v. Gan Soo Swee And Anor [1971] 1 LNS 118 PC ***(refd)***
Regina v. Chapman [1969] 2 QB 436 ***(refd)***
Regina v. Sharp (Colin) [1988] 1 WLR 7 ***(refd)***
RHB Bank Bhd v. Dong Haeng Industries Sdn Bhd [2001] 1 CLJ 417 HC ***(refd)***
Selvaduray v. Chinniah [1939] 1 LNS 107 HC ***(refd)***
Selvaduray v. Chinniah [1939] 8 MLJ (FMSR) 253 ***(refd)***
Stobart and Others (Executors of William Stobart) v. Dryden [1836] 1 M & W 615 ***(refd)***
Subramaniam v. Public Prosecutor [1956] 1 WLR 965 ***(refd)***
T Mahesan Thambiah v. Malaysian Government Officers' Co-operative Housing Society Ltd [1979] AC 374 PC ***(refd)***
Tempil Perkakas Sdn Bhd v. Foo Sex Hong (T/A Agrodrive Engineering) [1996] 1 LNS 99 HC ***(refd)***
Tengku Abdullah ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals [1997] 2 CLJ 607 CA ***(refd)***
The York and North Midland Railway Company v. Hudson [1853] 22 LJ Ch 529 ***(refd)***
William v. Wilcox And Another [1838] 8 AD & E 315 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Rules of the High Court 1980, O. 18 r. 7

Other source(s) referred to:
Phipson On Evidence, 15th edn, p 630
Rupert Cross, *Evidence*, 4th New Zealand edn, p 446

For the plaintiff - Lee Min Choon; M/s Wong Choo & Partners
For the defendant - Justin Chin; M/s Christina Chia Ng & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Malik Ishak J:

The Plaintiff's Claim

[1] The plaintiff, a private limited company, claims that the defendant while holding the position of a managing director of the plaintiff had personally received monies from P.T. International Corporation ("PTIC"), a Singapore company, under various contracts for the supply of goods which were meant for the plaintiff amounting to RM802,521.24 (see para. 6 of the statement of claim).

[2] The plaintiff advances another claim that the defendant had, after the defendant resigned as a managing director of the plaintiff, deprived the plaintiff of the benefit of various orders for the supply of goods to PTIC and that the defendant had personally received the sum of RM1,489,313.67 (see para. 7 of the statement of claim).

The Defendant's Defence

[3] The defendant, a Taiwanese national and a shareholder of the plaintiff, denied the plaintiff's claim and placed the plaintiff to strict proof thereto. The defendant did not personally receive any such monies from PTIC nor did the defendant supply any goods to PTIC. The monies that went to the defendant's wife's bank account were monies belonging to the defendant's friend, one Liu Jin Shu, a Chinese national, who had business dealings with PTIC and who had requested PTIC to remit monies to him through the bank account of the defendant's wife in order to avoid foreign currency controls of China.

The Undisputed Facts

[4] That the defendant had ceased to be the managing director of the plaintiff on 15 May 2000. And that between 10 May 1999 to 21 April 2000, a sum of RM802,521.24 had been transmitted by PTIC to the defendant's wife's bank account. Again, between 29 May 2000 to 12 December 2000, a sum of RM1,489,313.67 had been transmitted by PTIC to the defendant's wife's bank account. The defendant's wife goes by the name of Su Chin Chi.

The Disputed Facts

[5] The defendant disputed that PTIC had allegedly ordered certain goods from the defendant as the managing director of the plaintiff and intending to contract with the plaintiff. The defendant also disputed that the goods were delivered by the defendant personally and that the monies transmitted by PTIC to the defendant's wife's bank account were allegedly meant as payment for the purchase of such goods delivered by the defendant.

[6] The plaintiff disputed the defendant's explanation that the monies paid by PTIC to the defendant's wife's bank account were part of the purchase price for goods sold to PTIC by one Liu Jin Shu and were meant for the benefit of the said Liu Jin Shu.

Analysis

[7] At the trial, the plaintiff called only one witness - Mr. Ong Aik Lay (PW1). Now, PW1 gave a witness statement marked as Bundle "G" and he relied entirely on it. In PWI's witness statement, he said that he had been informed by one "Mr. Pishu" of PTIC that PTIC had placed orders with the defendant intending to order them from the plaintiff and that the defendant had delivered the goods to PTIC.

[8] Under cross-examination, PW1 admitted - which was consistent with his own witness statement, that he had no personal knowledge of whether PTIC in fact did or did not order any goods from the defendant and who in turn intended to order from the plaintiff. PW1 also admitted under cross-examination that he had no personal knowledge of whether the defendant did or did not deliver such goods to PTIC.

[9] Again, under cross-examination, PW1 admitted that he only knew what this "Mr. Pishu" of PTIC allegedly informed him.

[10] Of pertinence would be this. That no explanation was advanced by PW1 as to why "Mr. Pishu" or for that matter any other officer of PTIC with personal knowledge of the alleged matters were not called as the plaintiff's witness.

[11] The cross-examination of PW1 can be seen at pp. 4 to 5 of the notes of evidence and the exchanges were recorded as follows:

> The plaintiff's company is a trading house based in Singapore. It is not a shoe manufacturing company. Now I say, the plaintiff's company is a trading house based in Malaysia.
>
> Trading in shoes. Bundle 'B' is shown to witness at page 1 to page 22 and he is asked and he said:
>
> I received these invoices from Mr. Pishu.
>
> Q: Mr. Pishu informed you that these invoices were issued by the defendant, is that correct?
>
> A: Yes, as a matter of fact these invoices were given by Mr. Pishu.
>
> Q: Mr. Pishu also informed you that he had ordered goods from the defendant, is that right?
>
> A: Yes.
>
> Q: Did Mr. Pishu show you any purchase order?
>
> A: No.
>
> Q: Did Mr. Pishu show you any bill of lading or any other shipping document issued by the defendant?
>
> A: No.
>
> Q: Mr. Pishu worked for a business known as P.T. International Corporation?
>
> A: Yes.
>
> Q: P.T. International Corporation is owned by one person by the name of Ramesh Wadwani?
>
> A: Yes.
>
> I do not know whether P.T. International Corporation is no longer in business today.

Other than what Mr. Pishu informed me, I had no personal knowledge whether Mr. Pishu ordered any goods.

Other than what Mr. Pishu said to me, I had no knowledge whether those invoices were issued by the defendant.

Other than what Mr. Pishu told me, I had no personal knowledge whether the defendant actually sent any goods to P.T. International Corporation.

Bundle 'A' is shown to the witness and he is asked:

Pages 1 to 22 have reference and witness is asked and he said:

These documents were given to me by Mr. Pishu.

Other than what Mr. Pishu told me, I had no personal knowledge as to what these payments were for.

Q: Do you know who in P.T. International Corporation made these remittances?

A: Mr. Pishu and Mr. Ramesh. Both of them can transfer the money.

I do not know which one of them transferred the money.

[12] The re-examination of PW1 was rather short. At p. 6 of the notes of evidence, it was recorded thus:

Q: How do you know that these remittances at page 1 to page 22 of Bundle 'A' were made by Mr. Pishu or Mr. Ramesh?

A: This was told to me by Mr. Pishu himself.

[13] The whole of PW1's evidence hinged on "Mr. Pishu". It was a case of what "Mr. Pishu" had informed him. They were hearsay evidence and therefore inadmissible.

[14] In simple layman's term, hearsay is used to describe statements that one hears but does not know it to be true. It is more like gossip.

[15] The hearsay rule is perhaps best explained by referring to some case laws. I will start by referring to the case of *Billy Max Sparks v. The Queen* [1964] AC 964. That was a case where a white man was convicted of indecently assaulting a four year old girl. That girl did not give evidence at the trial. The defence called

A the girl's mother to give evidence who testified that shortly after the assault, the girl had said to her, "it was a coloured boy". The Privy Council held that the trial judge had correctly ruled that the evidence was inadmissible hearsay. Lord Morris made the following observations at p. 978:

B

> If it is said that hearsay evidence should freely be admitted and that there should be concentration in any particular case upon deciding as to its value or weight it is sufficient to say that our law has not been evolved upon such lines but is firmly based upon the view that it is wiser and better that hearsay should be
C excluded save in certain well defined rather exceptional circumstances.

[16] Next, it would be the case of *Stobart and Others (Executors of William Stobart) v. Dryden* [1836] 1 M & W 615. That was a case
D in regard to an action on a mortgage deed where the defendant sought to show that the mortgage deed had been fraudulently altered by one of the attesting witnesses. The defendant called a witness to prove that the attesting witness who was dead at the time of the trial had made both oral and written statements to
E show that he had fraudulently altered the mortgage deed. The court ruled that the evidence was inadmissible.

[17] At common law, hearsay evidence is inadmissible. That is the fundamental rule of evidence. *Phipson On Evidence*, 15th edn, at
F p. 630 defined hearsay evidence as follows:

> Oral or written statements made by persons who are not parties and who are not called as witnesses are inadmissible to prove the truth of the matters stated.

G **[18]** Rupert Cross, *Evidence*, 4th New Zealand edition, at p. 446 defined hearsay evidence in this way:

> "... any assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact or opinion asserted.

H

[19] If the purpose of tendering the statement as evidence is to show the speaker's state of mind, then it may be admissible as original evidence. A classic example is the case of *Subramaniam v. Public Prosecutor* [1956] 1 WLR 965, PC, where the position was
I neatly summarised in this way (see p. 970):

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

[20] Here, the purpose of PW1 in referring to what "Mr. Pishu" had told him was to establish the truth of what "Mr. Pishu" had said orally to him, and this would be hearsay and inadmissible.

[21] Similarly this court in *Nanyang Union Sdn Bhd v. Gloveline Industries (M) Sdn Bhd* [2006] 1 CLJ 873 expressed the same view through the judgment of Abdul Aziz Mohamad JCA (later FCJ) when his Lordship said at p. 875 of the report:

> Insofar as Radwan's evidence was as to what he was informed by two other persons, the evidence was hearsay and was inadmissible as proof of the truth of the information.

[22] And Abdul Kadir Sulaiman J (later FCJ) in *Tempil Perkakas Sdn Bhd v. Foo Sex Hong (T/A Agrodrive Engineering)* [1996] 1 LNS 99 dealt with the issue of hearsay evidence in this way:

> The simple answer to that is that it is clear law that if anything is said or tendered through a witness which is not within the actual knowledge of the witness, anything said or tendered would remain inadmissible notwithstanding the omission to object by the opposing party. The opposing party cannot be taken to have admitted to what had been said and tendered. In this case, the witness for the appellant had no personal knowledge of the facts stated in his evidence and of the contents of the documents that he tendered in support of his evidence. His evidence remains hearsay evidence and therefore, inadmissible.

[23] It must be borne in mind that there was the bank remittances which showed that PTIC had remitted monies to the defendant's wife's bank account as seen at pp. 1 to 22 of the Common Agreed Bundle of Documents marked as "A", but these documents standing on their own do not prove that PTIC have ordered goods from the defendant intending in turn to order them from the plaintiff. And neither do these documents show that the defendant had delivered the goods to PTIC. One must not forget that PW1 admitted in cross-examination that "other than what Mr. Pishu told" him, PW1 had no personal knowledge as to what the payments were for. Again, what "Mr. Pishu told" PW1 as to what the payments were for was entirely hearsay and inadmissible.

[24] Quite apart from the evidence of PW1 and the evidence of the bank remittances, the plaintiff adduced no other evidence. So, no other documentary evidence was adduced and marked as exhibits. And the plaintiff did not at any time attempt to bring into evidence nor mark as an exhibit the documents found in the Non-Agreed Bundle of Documents marked as "B" where its authenticity was disputed.

[25] It is part and parcel of my judgment that the plaintiff has failed to prove its alleged claim against the defendant. When PW1 was being re-examined, he testified that the remittances were made by Mr. Pishu or Mr. Ramesh and that PW1 knew about this because he was told by Mr. Pishu himself. Sadly, both Mr. Pishu and Mr. Ramesh were not called by the plaintiff to testify. Hearsay evidence remains throughout as hearsay and it remains inadmissible irrespective of whether any objection was taken at the trial (*Alcontara Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705, FC; and *Tempil Perkakas Sdn Bhd v. Foo Sex Hong (T/A Agrodrive Engineering) (supra))*. It goes without saying that on this point alone, the plaintiff's claim ought to be dismissed with costs.

[26] But lest I be accused of not assessing the evidence with a toothcomb, I must now proceed further. I must reiterate that the testimony of Mr. Pishu is of prime importance. Mr. Pishu's testimony will make or break the plaintiff's case. The importance of Mr. Pishu's testimony cannot be overstated. Yet, Mr. Pishu was not called as a witness for the plaintiff by the plaintiff. And no explanation at all was given as to why Mr. Pishu was not called.

[27] Had Mr. Pishu been called, he would certainly shed some light to the whole case. He too would be cross-examined by the defendant in regard to the alleged orders by PTIC and the alleged deliveries thereto including the necessity of producing copies of the shipping documents. It cannot be denied that if there had in fact been such delivery to PTIC, there would certainly be shipping documents to support it.

[28] What presumption can I possibly make in the absence of Mr. Pishu? The only presumption that can be made would be this. That had Mr. Pishu been called by the plaintiff to testify, Mr. Pishu's evidence would have been detrimental to the plaintiff. Section 114(g) of the Evidence Act 1950 allows the court to presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it. The

scope of illustration (g) to s. 114 of the Evidence Act 1950 has been lucidly laid down by Mohamed Azmi SCJ in *Munusamy Vengadasalam v. Public Prosecutor* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221. There his Lordship writing for the Supreme Court had this to say:

> It is essential to appreciate the scope of section 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[29] This court is entitled to have the best evidence before it. And the defendant was justified in imploring this court to invoke s. 114(g) of the Evidence Act 1950 in the absence of Mr. Pishu bearing in mind that the burden to prove the case rests, all along, with the plaintiff (*Selvaduray v. Chinniah* [1939] 1 LNS 107; *Ramoo v. Gan Soo Swee And Anor* [1971] 1 LNS 118; *Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors* [1998] 1 LNS 340; and *Chan Yoke Lain v. Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 CLJ 179).

[30] Material documents in the form of shipping documents were not produced by the plaintiff. It is common knowledge that any delivery of goods by any party to an international destination must be supported by shipping documents. Here, PTIC is a foreign company and if indeed the defendant had delivered the goods to PTIC as alleged such delivery could easily have been proven by producing the shipping documents. But the plaintiff failed to produce the shipping documents.

[31] The defendant had explained in his witness statement that for international shipping there should always be the bill of ladings, the packing lists, the customs clearance forms, etc, as proof of actual shipping. In his witness statement at questions 2 and 3, the answers advanced by the defendant reflect the necessity to have the material documents for verification and I shall now reproduce them:

> 2. Q: Please look at pages 1 – 22 of the Non-Agreed Bundle of Documents. Do you know the nature of these documents?

A: No. I have no knowledge of these documents. I believe these invoices are fictitious. The alleged transactions referred to in these invoices do not exist and these documents were used by the Plaintiff in the present action to victimise me.

3. Q: Why do you say that?

A: I have no business relationship with P.T. International Corporation at anytime either before or after I had resigned as a director of the Plaintiff's Company. The reason I say these invoices are fictitious because there are no supporting documents to verify the authenticity of the alleged transactions. In an ordinary business transaction, there are certain documents to be issued or exchanged between the contracting parties. These documents are purchase orders, delivery orders, invoices, packing lists, bill of ladings and customs clearance forms since the goods in question were alleged to be shipped to Singapore. In the present case, I had requested my lawyer to write to the Plaintiff's lawyer for copies of these documents but until to-date no supporting documents had been produced by the Plaintiff to this Honourable Court.

[32] Flowing from this, the relevant questions to pose would be these:

(a) where were those documents in respect of the alleged deliveries?; and

(b) why were they not produced?

[33] And the only reasonable answer would be that those documents do not exist because there was in fact no delivery of the goods as alleged by the plaintiff.

[34] Still on the issue of s. 114(g) of the Evidence Act 1950, the plaintiff questioned the existence of Liu Jin Shu. According to the plaintiff, the key witness for the defendant would be Liu Jin Shu. The defendant testified that he and Liu Jin Shu were very good friends, yet according to the plaintiff there was no evidence adduced to show the existence of Liu Jin Shu. No photocopies of Liu Jin Shu's passport nor letters from Liu Jin Shu or photographs of Liu Jin Shu were shown and marked as exhibits. Liu Jin Shu himself was not called as a witness for the defendant. It was submitted that if Liu Jin Shu exists, his presence in court at the

trial will put to rest all doubts about his existence. Even Lin Jin Shu's existence was challenged under cross-examination. The plaintiff's counsel put to the defendant under cross-examination that Liu Jin Shu did not exist and the defendant flatly denied it. But the defendant did not explain the absence of Liu Jin Shu nor produce him. The plaintiff urged this court to invoke s. 114(g) of the Evidence Act 1950 against the defendant.

[35] The plaintiff also submitted that the defendant should produce the contractual documents between Liu Jin Shu and PTIC bearing in mind that the friendship between Liu Jin Shu and the defendant would enable the defendant to easily obtain the contractual documents in question.

[36] It was submitted on behalf of the plaintiff that the defendant's story about Liu Jin Shu was a mere afterthought and a piece of fiction bearing in mind that it was not pleaded in the statement of defence. The same would also be true for the plaintiff in relation to the existence of Mr. Pishu or Mr. Ramesh. It was just like the proverbial words "the pot calling the kettle black".

[37] Be that as it may, the defendant admitted that the sum of RM2,291,834.91 (RM802,521.24 plus RM1,489,313.67) was remitted by PTIC to the bank account of his wife but in the same breath the defendant said that the monies belonged to Liu Jin Shu. Under cross-examination, the defendant was questioned as to what had happened to these monies. The defendant answered that all these monies were repaid to Liu Jin Shu by way of:

(a) small cash payments;

(b) telegraphic transfers; and

(c) investment in shares.

[38] It seemed that the bulk of the repayments to Liu Jin Shu was sent by telegraphic transfers. When the defendant was challenged to produce documentary evidence of these payments, the defendant produced bank savings account books, contract notes and statements in relation to the share transactions and all these were marked as Bundle "J". I have seen all the documents in Bundle "J" and I must say that they showed that the defendant's wife had some bank accounts and that certain share transactions were carried out in the defendant's name as well as in the name of the defendant's wife. But Bundle "J" do not show that monies were actually paid to Liu Jin Shiu.

[39] Furthermore, according to the defendant the mode of repayment of the monies to Liu Jin Shu was by way of telegraphic transfer, yet not a single evidence of telegraphic transfer was produced by the defendant. Even the bank requisition forms for the telegraphic transfers showing the name of Liu Jin Shu as the recipient were not produced.

[40] On the other end of the scale, the defendant submitted that no adverse inference ought to be invoked against the defendant for not calling Liu Jin Shu who hailed from China to testify for the following reasons:

(a) that the burden of proof rests with the plaintiff and that it is the plaintiff who has to prove its case;

(b) that the evidence of the plaintiff through PW1 are inadmissible being hearsay;

(c) that the plaintiff failed to call Mr. Pishu or Mr. Ramesh from PTIC to come to court and give evidence;

(d) that the plaintiff failed to adduce any admissible evidence to prove its case; and

(e) that the defendant has no legal obligation to call any witness to disprove the plaintiff's case and, consequently, the defendant's decision not to call Liu Jin Shu should not be construed adversely against the defendant.

[41] Terrell, Acting CJ in *Selvaduray v. Chinniah* [1939] 1 LNS 107 held that since the burden of proof was not on the defendant's part, the failure of the defendant to call a material witness would not attract the presumption under s. 114 of the Evidence Enactment. In the main body of the judgment, his Lordship had this to say:

> It is no doubt true as mentioned above that if the defendant had been the claimant, he could not have hoped to satisfy the Court, if he failed to call the witness with whom he alleged that the negotiations on behalf of the plaintiff were conducted. The reason for that would be that the Court is entitled to the best evidence available before it can be called upon for a decision, and if a plaintiff failed to call a material or essential witness it is almost inevitable that his claim would be rejected. But it is a very different thing to suggest that in a case where the *onus probandi* was not on him but on the other side, a failure to call a material witness would result in the same fatal consequences. As I have

> pointed out, although the establishment of the defendant's version would necessarily be conclusive against the plaintiff, a failure to establish it is by no means conclusive in the plaintiff's favour. The plaintiff must prove his case and it is sufficient for the defendant if the plaintiff fails to do so.

[42] Continuing His Lordship aptly said:

> It was quite competent for the defendant's counsel at the trial to decide that he had enough evidence to defeat the plaintiff's claim without substantially establishing the defendant's version, ...

[43] In my judgment, no adverse inference ought to be drawn against the defendant because "the burden of proof remains with the plaintiff" throughout the trial and that the defendant was in a better position to decide whether he had enough evidence to defeat the plaintiff's claim.

[44] The plaintiff argued that the defendant had breached his duty as a director of the plaintiff and later as the managing director by diverting the contracts to himself and depriving the plaintiff of the benefits of such contracts and carrying out such contracts with PTIC without the plaintiff's knowledge, consent or authorisation and retaining the proceeds of such contracts for himself.

[45] The plaintiff further argued that the defendant was under an implied trust to hold the proceeds of such contracts for the benefit of the plaintiff.

[46] The plaintiff also submitted that the defendant had made secret profits out of such contracts by reason of his position as the director and then as a managing director of the plaintiff. That being the case, it was submitted on behalf of the plaintiff that the defendant was liable to account to the plaintiff for the secret profits made from such contracts.

[47] The defendant denied that he had any business dealings with PTIC while he was a director and a managing director of the plaintiff as well as after he had resigned from those posts in the plaintiff. The defendant categorically said that the transactions for the supply of the goods to PTIC did not exist and that the invoices representing those transactions as found in the Non-Agreed Bundle of Documents marked as "B" where its authenticity was disputed and those invoices too were described as fictitious.

[48] But, unfortunately, all the allegations against the defendant about contracting with PTIC without the plaintiff's knowledge, consent or authorisation and retaining the proceeds of those contracts to himself together with the arguments that the defendant held the proceeds of those contracts by way of an implied trust for the benefit of the plaintiff and further that the defendant had made secret profits arising from those contracts and must be held accountable to the plaintiff collapsed to the ground like a deck of cards because Mr. Pishu did not come forward to testify and the evidence of PW1 was hearsay and inadmissible.

[49] It is trite that witnesses must give their testimony orally in court and must testify only as to matters within their own first-hand knowledge. In *Regina v. Sharp (Colin)* [1988] 1 WLR 7, Lord Havers stated that an assertion other than one made by a person while testifying in the proceedings is generally inadmissible as evidence of any fact asserted.

[50] Where a witness, like PW1, seeks to reassert or rely upon information which others have told him that would be hearsay and inadmissible. When the evidence tendered is for the purpose of establishing the truth of what was said then it becomes hearsay and inadmissible (*Subramaniam v. PP (supra)*; *R v. Willis* [1960] 1 All ER 331; *Regina v. Chapman* [1969] 2 QB 436; and *Mawaz Khan and Amanat Khan v. The Queen* [1967] AC 454). As I see it, the hearsay rule is a rule against the use of second-hand evidence. And that was the kind of evidence which PW1 advanced before this court. They are hearsay and inadmissible.

[51] There is an averment in the statement of claim at para. 5 which alludes to the duty of the defendant as a director of the plaintiff and it is worded as follows:

> While he was a director of the plaintiff, the defendant was under a duty at all times to act honestly and to use reasonable diligence in the discharge of his duties as a director.

[52] According to *Ferguson v. Wilson* [1866-67] 2 LR Ch App 77; and more recently in the case of *Adams v. R* [1995] 2 BCLC 17, 30, PC, a director may stand and be considered as an agent of the company and that a director too is said to be a trustee of the company (*The York and North Midland Railway Company v. Hudson* [1853] 22 LJ Ch 529; *In re Forest of Dean Coal Mining Company* [1878-79] 10 Ch D 450; *In re Lands Allotment Company* [1894]

1 Ch 616; *Chang Lee Swee v. PP* [1984] 1 LNS 134; and *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55). Way back in 1872, Lord Selbourne in *Great Eastern Railway Company v. Turner* [1872-73] 8 LR Ch App 149, 152 aptly said:

> The directors are the mere trustees or agents of the company - trustees of the company's money and property - agents in the transactions which they enter into on behalf of the company.

[53] In company law, directors stand in a fiduciary relation to the company and all the powers of the directors are entrusted to the directors in the directors' fiduciary capacity (*Kelly v. CA & L Bell Commodities Corporation Pty Ltd* [1989] 18 NSWLR 248, 256; *Hospital Products Limited v. United States Surgical Corporation And Others* [1984-1985] 156 CLR 41, 96 to 97; and *Tengku Abdullah ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals* [1997] 2 CLJ 607). It is quite elementary when we say that a company director is in a fiduciary position to that of the company (*Australian Growth Resources Corporation Pty Ltd v. Van Reesema* [1988] 13 ACLR 261, 268).

[54] The law books are replete with authorities on the fiduciary position of directors. They all say the same thing but in a different way. In *Hospital Products Limited v. United States Surgical Corporation And Others (supra)* at p. 103, Mason J, observed as follows:

> ... the fiduciary's duty may be more accurately expressed by saying that he is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict or a real or substantial possibility of a conflict between his personal interests and those of the persons whom he is bound to protect.

[55] All these legal technicalities would be activated provided the plaintiff here who has the burden of proving that the defendant as the director has breached his fiduciary duties (*Intraco Ltd v. Multi-Pak Singapore Pte Ltd* [1995] 1 SLR 313, 324, CA). But, unfortunately, the evidence of PW1 falls far short of the mark because it is hearsay and it is inadmissible. What a pity.

[56] Now, even if the plaintiff's allegations were true, which was not the case here, there was no breach of fiduciary duty on the defendant's part. It is undeniable that the plaintiff's business was that of a trading company that dealt in shoes. The plaintiff did not

A deal in apparel business and this evidence was not challenged by the plaintiff at all. The alleged orders from PTIC were for apparels (clothes) and the plaintiff did not deal in apparels and, consequently, the plaintiff has not suffered any loss whatsoever.

B **[57]** It must be recalled that the plaintiff's statement of claim pleaded and alleged that the defendant had received monies from PTIC. The plaintiff's statement of claim did not plead by way of an alternative that the monies have been received by the defendant's nominee or the defendant's wife. From the available C evidence adduced before this court there was nothing to show that the defendant received any monies. The evidence showed that the monies paid by PTIC were received by the defendant's wife. That being the case, it can safely be said that the plaintiff has failed to prove its case based on the pleadings.

D **[58]** The plaintiff submitted that its case had been proved by the fact that PTIC had given copies of the invoices as seen at pp. 1 to 22 of the Non-Agreed Bundle of Documents marked as "B" where the authenticity was disputed. But these documents were not formally proved bearing in mind that formal proof was not E dispensed with because the authenticity of these documents were disputed. The plaintiff never made an attempt to comply with formal proof of these documents and that being the case all the invoices in that Non-Agreed Bundle were inadmissible.

F **[59]** By way of an analogy, reference should be made to the case of *KBB Properties Sdn Bhd v. Yong Chon Chiang* [2006] 6 CLJ 421 where the High Court held that the invoice and the receipts there on re-instatement costs were disputed and were part of the "Non-Agreed Bundle of Documents" and they must be proved formally. G And since the plaintiff there failed to formally prove the documents, the High Court reversed the decision of the sessions court and disallowed the plaintiff's claim on re-instatement costs on the ground that there were no admissible evidence to support it.

H **[60]** Likewise here, the plaintiff failed to formally prove the disputed documents at pp. 1 to 22 of the Non-Agreed Bundle of Documents marked as "B" and this court must accordingly hold them to be inadmissible.

I

[61] Now, even if those disputed documents are considered as admissible evidence, they could hardly be said to have proved the plaintiff's case. It must be recalled that the fact that Mr. Pishu had given copies of those documents merely showed just that and that would be that Mr. Pishu had given copies of those documents to the plaintiff. It cannot go further than that. Without the oral testimony of Mr. Pishu, the fact that the copies were given to PW1 makes not a whit of a difference. It did not prove anything against the defendant. There was no admissible evidence to show how Mr. Pishu obtained those documents in the first place. A flurry of questions surfaced:

(a) who made those documents?;

(b) how were those documents sent to Mr. Pishu?; and

(c) were those documents obtained from the defendant or from some other sources?

[62] The plaintiff's statement of claim, it must be recalled, did not plead that the monies had been received by the defendant's wife or by the defendant's nominee. It was at the discovery stage when the documents were exchanged that the defendant knew for the first time that the plaintiff was referring to the defendant's wife who had received the payments. With that scenario in mind, the defendant cannot be blamed for not having pleaded that the monies paid to the defendant's wife were, in fact, for Liu Jin Shu.

[63] There was no necessity for the defendant to plead the "evidence" in the statement of defence. It would be sufficient for the defendant to merely plead the relevant "facts" in the statement of defence. Indeed that has been done and the relevant facts pleaded were as follows:

(a) that the defendant did not receive any monies from PTIC;

(b) that the defendant did not receive any orders from PTIC; and

(c) that the defendant did not deliver any goods to PTIC.

[64] The law on pleading has been lucidly laid down in *William v. Wilcox And Another* [1838] 8 AD & E 315, 331 at p. 863 and there the court said:

> It is an elementary rule in pleading, that, when a state of facts is relied on, it is enough to allege it simply, without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation.

[65] Order 18 r. 7 of the Rules of the High Court 1980 ("RHC") talks of facts and not evidence to be pleaded. In short, pleadings contain concise statements of fact and that only the material facts and not the law or evidence has to be pleaded. Thus, only those material facts which are necessary to formulate a complete cause of action has to be pleaded (*Bruce v. Odhams Press, Limited* [1936] 1 K.B. 697; *Bangkok Bank Ltd v. Prosperity Shipping & Trading (Pte) Ltd & Ors* [1990] 1 MLJ xxix; and *RHB Bank Bhd v. Dong Haeng Industries Sdn Bhd* [2001] 1 CLJ 417 at 438). The material facts are pleaded so as to put the defendant on guard and to convey to him what he has to prepare when the case eventually comes up for trial (*Phillips v. Phillips And Others* [1878-79] 4 QBD 127, CA). It was for that reason that the defendant merely pleaded the relevant facts in the statement of defence to counter the plaintiff's claim.

[66] In regard to the alleged secret profits which the defendant was said to have benefitted, I have this to say. A director owes a fiduciary duty to his principal and he must prefer his principal's interests to that of his own (see Goff & Jones, *The Law of Restitution*, 6th edn, 2002). And if the director secretly makes a profit behind the back of his principal he must be accountable for it and he may be liable in damages for deceit (*T Mahesan s/o Thambiah v. Malaysian Government Officers' Co-operative Housing Society Ltd.* [1979] AC 374, PC). But in the present case at hand, the plaintiff was only conjecturing that the defendant had secretly made a profit for himself. I agree that plaintiff's submissions were based on mere conjectures. It was argued on the "must be" and "must have" basis, which can be dismissed in one single word as "hearsay". Thus, we have the scenarios that the plantiff say that:

(a) the plaintiff's allegations of secret profits "must be true" otherwise "why would" PTIC reveal the fact that PTIC had made payments to the defendant's wife?;

(b) PTIC "must have" thought that they were contracting with the plaintiff, if not "why would" PTIC provide documents to the plaintiff?; and

(c) since we do not know who produced the invoices at pp. 1 to 22 of the Non-Agreed Bundle of Documents marked as "B" and PTIC had the invoices and PTIC dealt only with the defendant, then the defendant "must have" created the invoices.

[67] All these were mere conjectures. The sum total of it all was this. That the plaintiff's claim must be dismissed with costs.